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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 240

JOHN BARCLAY, JR., EXECUTOR OF THE ESTATE OF REBECCA COULTER BARCLAY, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 65–72) is reported at 73 F. Supp. 816, and the memorandum opinion of the District Court on taxpayer's motions to amend conclusions of law and for a new trial (R. 72–73) is reported at 74 F. Supp. 938. The opinion of the Court of Appeals (R. 74–81) is reported at 175 F. 2d 48.

JURISDICTION

The judgment of the Court of Appeals was entered on April 27, 1949 (R. 82). A petition for rehearing was denied on June 18, 1949 (R. 87). The petition for a writ of certiorari was filed on August 8, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

QUESTIONS PRESENTED

1. Whether the decision of the court below, in holding that one-fifth of the principal of the trust created by decedent's mother was includible in the decedent's gross estate under Section 302 (f) of the Revenue Act of 1926, as amended, is in accordance with the decision of this Court in *Estate of Rogers* v. *Commissioner,* 320 U. S. 410.

2. Whether the decision of the court below, in holding that one-fifth of the principal of the trust created by decedent's mother was includible in the decedent's gross estate under Section 302 (a) of the Revenue Act of 1926, as amended, is in conflict with the decision of this Court in *Helvering* v. *Safe Deposit Co.,* 316 U. S. 56.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real

property situated outside the United States—

(a) To the extent of the interest therein of the decedent at the time of his death; * * *

* * * * *

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will * * *.

* * * * *

Treasury Regulations 80 (1937 ed.):

ART. 13. *Property of decedent at time of death.*—It is designed by the foregoing provision of the statute that there shall be included in the gross estate all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death, except real property situated outside the United States.

* * * * *

STATEMENT

The District Court found the facts as stipulated (R. 65). The material portions of the stipulation of facts (R. 17–65) may be summarized as follows:

Rebecca Coulter Barclay, the decedent, died in 1937, a citizen of the United States and a resident of Pennsylvania (R. 17). At the time of her death, the decedent was the donee of a general testamentary power of appointment over an interest in property, the donor of which was her

mother, Emma W. Coulter, who died in 1929 (R. 19).

In her will, the decedent-donee directed payment of her debts, funeral expenses and probate expenses (R. 62). Further, she made specific bequests totaling approximately $120,000 (R. 62–64). The last dispositive feature of the will stated: "All the rest, residue and remainder of my estate I will, devise and bequeath to my son John Barclay" (R. 64). John Barclay, Jr., is decedent's sole heir at law (R. 20).

The decedent did not, by her will, expressly purport to exercise the power of appointment conferred upon her by the will of the donor (R. 20).

A codicil to the donor's will provided for the establishment of a testamentary trust payable in equal shares to her five children (including decedent, and upon termination of the trust, the principal was also distributable to them (R. 54–62). Each beneficiary was given a general testamentary power of appointment over his share of income and principal. In default of appointment, such share would go to the person or persons entitled to receive it under the laws of Pennsylvania, as "if such deceased child at the time of his or her death had been legally seized and possessed of said share in his or her own right and had died intestate" (R. 59).

The trust set up by the donor is still in existence and has not been terminated (R. 20).

In 1939, John Barclay, Jr., filed in the Orphans' Court of Westmoreland County, Pennsylvania, a written instrument stating that he thereby elected to take whatever interest he may have in the trust established under the will of the donor by and through the will of the donor and not under the will of the donee of the power (R. 64–65).

In filing the federal estate tax return for the decedent, the value of the one-fifth interest of the trust created by Emma W. Coulter was not included. The Commissioner determined that the decedent had exercised her general power of appointment and that such exercise required the interest to be included in decedent's gross estate. (R. 19). The tax deficiency was paid and a suit for refund was instituted. In determining the deficiency, the Commissioner included in the decedent's gross estate the sum of $71,848.84, which was the value of a one-fifth interest in the principal and undistributed income of the trust established by the donor (R. 19).

Both the District Court (R. 67) and the Court of Appeals (R. 80–81) held the one-fifth interest was properly included in decedent's gross estate under Section 302 (a) and (f) of the Revenue Act of 1926, as amended.

ARGUMENT

1. The Court of Appeals was correct in holding that the instant case came squarely within the principles enunciated by this Court in *Estate*

of Rogers v. *Commissioner,* 320 U. S. 410.[1] There the donee of a general testamentary power of appointment exercised his power to create interests which were qualitatively different and presumably less in value than those which the appointees would have received as takers in default under the donor's will if the power had not been exercised. The property was included within the donee's taxable estate, thus establishing a limitation on the so-called divestment theory of *Helvering* v. *Grinnell,* 294 U. S. 153, where the appointed shares were entirely coterminous with the gifts in default of appointment.

The *Rogers* case, *supra,* reflects an economic concept of exercise of a power wherein taxation will turn on substance and not form; estate taxation depends upon the exercise of the privilege of directing the course of property after death." Paul, *Federal Estate and Gift Taxation,* Supplement (1946), p. 240; 53 Yale L. J. 572 (1944); 61 Harv. L. Rev. 1063 (1948).

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[1] Certiorari was granted in the *Rogers* case because of an asserted conflict between the decision of the Second Circuit in that case and *Rothensies* v. *Fidelity-Philadelphia Trust Co.,* 112 F. 2d 758 (C. A. 3d), and *Legg's Estate* v. *Commissioner,* 114 F. 2d 760 (C. A. 4th). These cases determined that no property "passed" under the appointment to the extent that the beneficiaries under local law derived legal title to appointed property from the donor of the power, a standard which this Court discarded in the *Rogers* case (320 U. S. at 413–414).

The court below found that the decedent had availed herself of the privilege of directing the course of the property when she directed inferentially the appointive property into her own estate, with certain legacies and debts to be paid therefrom, and the balance to the taker in default. Thus, the decedent indulged her testamentary fancy to the fullest extent.

The fact that the "quantum was not altered one iota" (Br. p. 21) is immaterial. As was said in *Guaranty Trust Co. of New York* v. *Johnson,* 165 F. 2d 298, 300 (C. A. 2d), "that it so happened that at her death the appointed property was neither needed nor used to pay any specific legacies is quite irrelevant." The pivotal point is that the decedent-donee, by exercising her power, has substituted her scheme of distribution for that of the donor. This is more than merely echoing the limitations over upon default of appointment. The emphasis in *Estate of Rogers* v. *Commissioner,* 320 U. S. 410, is on the donee's act in shaping devolution; it is an exercise of dominion, such as in the instant case, that the statute hits.

Similarly, any discussion of renunciation is irrelevant.[2] The estate tax is a tax on the transfer, not the receipt of property.

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[2] Renunciation was not mentioned in the *Rogers* case, *supra*, although the Government had emphasized its relevance. See Brief for Respondent, pp. 11, 38. Others have deemed the renunciation feature to have no significance

In addition, the Court of Appeals was correct in its interpretation of local law as affecting the extent of the exercise of the power. After the *Rogers* decision, *supra,* p. 414, the functions of local law are exhausted once it is determined that "the appointment had legal validity and brought into being new interests in property."

In regard to the interests created, the court below held that, under the applicable Pennsylvania law, the decedent commingled or blended the appointive property with her separate estate on the authority of *Penna. Co. for Ins. on L. & G. A. Account,* 264 Pa. 433, 436. The petitioner's argument that *Huddy's Estate,* 236 Pa. 276, is authority to the contrary in that an inference of the intention of blending may not be drawn where the separate estate is sufficient to pay specific legacies, is not persuasive. In that case, the present situation was explicitly excluded (p. 281):

> It is not an instance where the donee of the power either expressly or by implication appointed the fund for the payment of her debts, * * *

(Griswold, *Powers and the Federal Estate Tax*, 52 Harv. L. Rev. 929, 935–936 (1939)), or have suggested that renunciation be made explicitly immaterial by statute (Buck, Craven and Shackelford, *Treatment of Powers of Appointment for Estate and Gift Tax Purposes*, 34 Va. L. Rev. 255, 281 (1948)). Alternatively, the Court of Appeals held that the decedent exercised her power in favor of her own estate and that Barclay, Jr., had nothing to renounce.

Hence, the Court of Appeals was correct in its interpretation of local law as affecting the creation of property interests.

After local law has exercised its limited function, federal law steps in to determine whether property has passed in accordance with uniform criteria, divorced from the diverse attitudes and whimsies of local law. Therefore, the argument that the Pennsylvania rule would make the legatee in default take from the donor is irrelevant.[3]

Further, assuming *arguendo* that Barclay's renunciation was not a nullity, the decedent did exercise dominion over the appointive property. As stated, this is the single standard of the *Rogers* decision, *supra.*

2. Similarly, the Court of Appeals was correct in bottoming its decision on Section 302 (a) of the Revenue Act of 1926, as amended, i. e., that there was a sufficient shifting of economic interests at the death of the decedent to bring the corpus within the taxing statute.

As pointed out by this Court in *Tyler* v. *United States,* 281 U. S. 497, 503, the crucial question is "whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of tax upon that result." Obviously, the precise type of transfer alluded to was produced

[3] See note 1.

in the instant case by the decedent's appointment to her own estate, the resultant blending of the appointive and separate property, and the passing to Barclay, Jr.

Helvering v. *Safe Deposit Co.*, 316 U. S. 56, is not in conflict with this reasoning. There the power was unexercised; here, it was exercised in all events, but more particularly, in favor of the decedent's estate. This is very clearly an "interest" in property.

CONCLUSION

The decision of the court below is correct and is in accordance with the controlling authorities. There is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
LEE A. JACKSON,
GEORGE D. WEBSTER,
Special Assistants to the Attorney General.

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